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**FISCAL YEAR 2006
CHILD AND ADULT CARE FOOD PROGRAM
OPERATIONAL MEMO #11**

TO: Child and Adult Care Food Program Institutions

FROM: Mary Ann Chartrand, Director
Grants Coordination and School Support

DATE: January 24, 2006

**SUBJECT: Clarification of Invitation for Bid and Request for Proposal
Procedures and Applications**

Attached are responses to several questions received by the Child Nutrition Division of the U. S. Department of Agriculture (USDA) concerning the procurement requirements of 7 CFR Parts 3016 and 3019, in regards to invitation for bids (IFBs) and request for proposals (RFPs). Although many questions and answers refer to "schools" or "SFAs," the same procurement principles and procedures apply to entities expending Federal funds through the administration of the Summer Food Service Program and the Child and Adult Care Food Program.

Please note Question 6, which is a change from previous policy. It is now affirmed that price is the primary factor in the award of a contract when using an RFP.

Question 1: Can a school food authority (SFA) enter into sole source contract with a supplier that advertises itself as the sole provider of a product or service in the marketplace?

Answer: No. In the Child Nutrition (CN) Programs, a sole source situation only occurs when the goods or services are available from only one manufacturer through only one distributor or supplier. The decision that a sole source situation exists must be made by the SFA, not the supplier. While one supplier may offer goods and services that contain features not available from other suppliers, the SFA must be able to document that those specific features are required, not just preferred. Since sole source procurement takes place without competition, an SFA must maintain appropriate documentation that supports its decision.

A sole source situation is a condition of the procurement environment, not a procurement method.

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While a supplier can claim its products are the sole products available in the marketplace that meet the SFAs needs, the advertisement alone does not make the claim true. SFAs that fail to validate such claims may subsequently enter into improperly procured contracts.

Question 2: What happens if an SFA enters into a sole source contract improperly?

Answer: When solicitation and contract deficiencies are identified, the SFA cannot fund the contract costs, including any ongoing and maintenance costs, from the nonprofit food service account. Thus, if the SFA is unsure whether a sole source situation exists, it is recommended that the SFA contact the Michigan Department of Education (MDE) for prior approval before proceeding.

Question 4: Is there a dollar threshold that must be used when determining whether a change to an existing contract is material?

Answer: No. While the cost of a proposed amendment is a factor that SFAs should use in determining whether a proposed change is material, there is no minimum threshold. A key factor in determining materiality is whether other bidders would have bid differently had they known of the change.

Question 5: How should an SFA determine whether a purchase should be made using sealed bidding or competitive proposals?

Answer: When deciding whether sealed bidding using an invitation for bid (IFB) or competitive proposals using a request for proposal (RFP) should be used, the SFA needs to consider a number of factors. Commercially available items should be acquired using the sealed bidding method because the items can be adequately identified, ancillary services such as delivery and handling can be specified, and the requirements for a responsible and responsive bidder can be described. When these conditions exist, the only remaining factor in the award of the contract is cost.

When developmental work is needed, the acquisition generally lends itself to competitive proposals. The expectations and outcomes can usually be met by more than one method and acceptable offers will differ both technically and financially. When deciding to use competitive proposals, the SFA must also have sufficient skill and expertise to evaluate and rank proposals and conduct negotiations with top bidders.

Since the response to an RFP consists of two distinct elements, the technical proposal and the cost proposal, the negotiation process requires significant experience and skill in negotiation. SFAs that do not possess staff with effective negotiation skills may have to incur additional costs to allow for the contracting of an individual(s) with the appropriate negotiation skills, which is another factor that SFAs must consider.

Question 6: Doesn't using an RFP allow an SFA to award a contract without price being the most important factor?

Answer: No. The goals of sealed bidding and competitive proposals are the same. These goals are to obtain the best product/proposal at the lowest price. Part 3016.36(d)(3)(iv) provides that when using the competitive proposal method, the award is made with "price and other factors considered". Many view the competitive proposal method as a means to avoid considering cost in the award of a contract; however, such views contradict United States Department of Agriculture regulations and good business practices.

Because price is the primary contract award factor when using competitive proposals, the Food and Nutrition Service recommends the use of the two-step RFP process. Under this process, technical proposals are solicited, evaluated, and ranked before cost is considered. Once the SFA has identified its top-ranked bidders, the SFA enters into negotiations with these bidders. These negotiations are directed at obtaining equivalent, not necessarily equal technical proposals, any of which would meet the SFA's needs. Once equivalent proposals are obtained, the SFA requests these bidders to submit best and final prices. The award is then made to the bidder submitting the lowest price since all of the negotiated offers have been deemed acceptable.

SFAs that do not use the two-step approach must develop evaluation and ranking criteria that identify cost as a primary factor. Once the technical and cost components of the proposal have been evaluated and ranked, the SFA negotiates both components. This form of negotiation can be very complex since both the technical and cost components will be changing throughout the negotiation process. At the conclusion of the negotiations, the award is made to the bidder presenting the best proposal, with price being the primary factor.

Question 7: Must SFAs always negotiate when using the competitive proposal method?

Answer: While the negotiation phase is not mandated, the primary benefit of this procurement method is lost if negotiations are not conducted. If negotiation is not used, the SFA should evaluate whether competitive proposals are the appropriate procurement method for the planned acquisition since it can obtain the same results using sealed bidding.

Question 8: Recently, on an SFA received bid protest. Should the protest be sent to either the USDA or MDE?

Answer: No. Pursuant to 3016.36(b)(12), SFAs must have procedures in place to handle disputes relating to their procurements and are responsible for resolving bid protests.